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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,
Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
Appellee.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the action should be dismissed on grounds of *res judicata* or because the district court lacked jurisdiction over the constitutional issues.

2. Whether appellee's rights to equal protection of the law have been violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations.

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INTEREST OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES

The Veterans of Foreign Wars of the United States ("VFW") is a federally-chartered veterans' organization. Act of May 28, 1936, ch. 471, § 1, Pub. L. No. 74-630, 49 Stat. 1390. With 1.9 million members, the VFW is one of the largest veterans' organizations in the United States. The VFW engages in a broad range of activities on behalf of veterans, including lobbying. The VFW is funded, in part, by tax-deductible contributions.

If the decision of the court of appeals is upheld, the interests of the VFW could be directly and adversely affected. The court found that appellee's rights to equal protection of the law were violated by a statutory limitation on its ability to lobby with tax-deductible contributions that does not apply to veterans' organizations such as the VFW. The court remanded the case for a determination of whether the constitutional infirmity should be cured by eliminating the lobbying limitation altogether

or by extending that limitation to veterans' organizations. The court recognized that veterans' organizations "would be directly affected" by extension of the lobbying limitation [1] and therefore directed that veterans' organizations be invited to participate on remand. J.S. App. at 77a.

Appellant filed a timely notice of appeal to this Court. J.S. at 2. Asserting that the court of appeals' determination of constitutional invalidity is erroneous, J.S. at 10, appellant has urged that jurisdiction be noted "in order to resolve the important constitutional question presented." J.S. at 12. In a decision of this Court, just as on remand, the status of the VFW under a complex statutory scheme could be altered, perhaps in unintended ways, and the rights accorded to it by the Congress could be abridged. The VFW therefore has a direct and substantial interest in the outcome of this litigation.

SUMMARY OF THE ARGUMENT

This action is the latest in a series of lawsuits brought by the same individuals, acting through appellee and its predecessor corporations, to litigate the same constitutional issues. The independent interests of the judicial system should prompt the Court, *sua sponte*, to consider the issue of *res judicata* in such a case. In addition, this action was commenced under Section 7428 of the Internal Revenue Code,[2] which does not provide for judicial review of constitutional questions that were outside the scope of the administrative proceeding. On either of these grounds the Court could conclude that the case should be dismissed.

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[1] Jurisdictional Statement Appendix at 76a, Taxation With Representation of Washington v. Regan, 676 F.2d 715 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3001 (U.S. July 6, 1982) (No. 81-2338) (hereinafter cited as J.S. App.). The Jurisdictional Statement is hereinafter cited as J.S.

[2] All references to Sections and Regulations herein are to sections of the Internal Revenue Code of 1954, and to the Treasury Regulations promulgated thereunder, as amended to the date of this brief, unless otherwise indicated. 26 U.S.C. § 1, *et seq.* (1976 and Supp. IV 1980); 26 C.F.R. § 1.0 *et seq.* (1982).

Alternatively, although the record in this case is flawed, there is sufficient evidence to allow the Court to reverse the court of appeals on plenary review. The court of appeals misconstrued or ignored legislative history that clearly indicates that the Congress chose to apply different rules where it had different concerns. Such deliberate distinctions, particularly in the area of federal taxation, do not violate appellee's rights to equal protection. If the Court is not prepared to reverse on this basis, however, this proceeding should be recommenced *ab initio*, rather than on a limited remand.

ARGUMENT

I. THE COURT SHOULD DISMISS THE CASE ON GROUNDS OF *RES JUDICATA* OR BECAUSE THE COURT LACKS JURISDICTION TO ADJUDICATE THE CONSTITUTIONAL QUESTIONS AT ISSUE.

A. The Court should consider, *sua sponte*, the problem of *res judicata* that arises from the history of appellee's litigating activities.

Appellee is the most recently formed in a succession of corporate entities utilized by the same few individuals to carry on a program of legislative and administrative reform in the federal tax area. This case is the third attempt by these individuals, acting through appellee and its privies, to litigate the same constitutional issues.

Appellee itself was formed "to absorb and carry forward" the activities of two other nonprofit organizations, Taxation with Representation ("TWR") and the Taxation with Representation Fund ("TWR Fund"); the TWR Fund was formerly known as Tax Analysts and Advocates ("TA/A").[3] In response to the question of whether it had ever filed for an employer identification number, appellee stated that it had done so under the names of

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[3] Appendix of Plaintiff-Appellant at 11, Taxation With Representation of Washington v. Blumenthal, 81-1 U.S. Tax Cas. (CCH) ¶ 9329 (D.C. Cir. 1981), *rev'd en banc and vacated as moot*, 676 F.2d 715 (hereinafter cited as A.).

TWR and TA/A. A. at 47. The merger plans contemplated greater efficiency "if the charitable functions of these two groups could be united in a single organization". A. at 18. Appellee has the same chief executive, Thomas F. Field, as TWR and TWR Fund, A. at 16, and employs the same attorney (*Compare* A. at 6 *with Taxation With Representation v. United States*, 585 F.2d 1219, 1220 (4th Cir. 1978), *aff'g* 76-2 U.S. Tax. Cas. (CCH) ¶ 9693 (E.D. Va. 1976), *cert. denied*, 441 U.S. 905 (1979)). It is thus clear that appellee was created to be the successor in interest to TWR and TWR Fund, to assume their functions and to carry on their programs, and that there is an identity of interest between appellee and the two original organizations.

In 1973, TWR Fund filed suit seeking a declaratory judgment that the restriction on lobbying by charitable organizations was unconstitutional. In 1974, the suit was dismissed on jurisdictional grounds. *Tax Analysts and Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974), *appeal dismissed mem. sub nom. Tax Analysts and Advocates v. Simon*, 512 F.2d 992 (D.C. Cir. 1975). In 1975, TWR instituted an action raising the same claims at issue herein. The Court of Appeals for the Fourth Circuit, affirming the district court, held that neither the First nor the Fifth Amendment rights of TWR had been violated as a result of the statutory scheme. *Taxation With Representation v. United States.* Appellee was incorporated on June 14, 1977, A. at 24, and brought the present action on May 10, 1978. A. at 3.

If one compares the instant case with the TWR litigation, one finds identical issues, common control of the actions and the entities by the same individuals, common counsel, continuity of function (or at least proposed continuity), and a final judgment in the earlier litigation. Thus, although appellee is legally distinct in its corporate form from TWR, the traditional *res judicata* or preclusion principles apply. *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 639 (7th Cir. 1935); *Performance Plus*

Fund, Ltd. v. Winfield & Co., 443 F. Supp. 1188 (N.D. Cal. 1977).

Although *res judicata* and collateral estoppel are waivable affirmative defenses under Fed. R. Civ. P. 8(c), federal trial and appellate courts in appropriate cases have addressed the issue *sua sponte*. *See* J.S. App. at 84a, n.9 (discussion by dissenting judges in court of appeals). The reasons cited in such cases for independent consideration include the conservation of judicial resources, the promotion of finality in litigation, and the fostering of reliance on judicial decisions. It is for these reasons, quite apart from any consideration of the interest of appellant and thus without reference to the failure of appellant to raise the affirmative defense below, that the Court should take cognizance of the *res judicata* question.

The facile use of multiple corporations in this case highlights the potential for abuse of the judicial system by nonprofit organizations, and should lead the Court to consider the question of preclusion *sua sponte*. Entities seeking recognition of tax-exempt status are almost by definition made of paper, organized with a minor commitment of funds or resources. A nonprofit corporation can be created in almost any jurisdiction for a cost not exceeding a hundred dollars, by one or a few individuals who assume no liability or responsibilities thereby. If appellee in its present corporate form had not found a favorable response in this particular court of appeals, it would have been only too easy for its president and counsel to raise the issue again in yet another judicial circuit through a new corporate entity. Unless the principles of *res judicata* impose some meaningful limit, a single individual with a sufficient commitment to almost any issue can move through the courts in a succession of nonprofit corporate shells, consuming the resources of the judicial system in continuing reconsideration of his own preoccupation.

Although the dissent suggests that a consideration of the *res judicata* issue would require a remand, J.S. App.

at 84a, n.9, there is no compelling reason why this should be so. The record now before the Court sets forth completely the litigating pattern of appellee and its predecessors, and contains sufficient information to identify precisely their interrelationship.[4] The factual basis for a decision is thus present, and no substantial interest would be served by remand of the case for fact-finding on this issue.

B. The Court lacks jurisdiction to adjudicate constitutional issues in a case brought under Section 7428.

Appellee commenced this action in federal district court under Section 7428, seeking review of an Internal Revenue Service determination with respect to its exempt status.[5] Section 7428 is much more limited in scope than the general declaratory judgment jurisdiction provisions, however, and does not provide for judicial review of constitutional questions that were not, and could not have been, at issue in the administrative proceeding. Jurisdiction is thus limited to the question of whether the Internal Revenue Service properly applied existing law to the facts presented to it.

Declaratory judgment actions under the internal revenue laws are generally barred by statute. *See* Section 7421 and 28 U.S.C. § 2201. Prior to enactment of Section 7428, therefore, an entity whose application for exempt status under Section 501(c)(3) had been denied by the Internal Revenue Service could seek judicial review of the adverse ruling only through a deficiency proceeding or tax refund suit. In *Bob Jones University v. Simon*, 416 U.S. 725 (1974) and *Alexander v. "Americans*

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[4] Appellee's president has published a narrative history of the "decade-long effort" that he and his attorney undertook through successive corporate forms in this series of lawsuits. Field, *Charitable Lobbying Restraints Held to be Discriminatory*, 15 Tax Notes 91 (April 5, 1982). The description of the demise of TWR and the present plans for TWR Fund suggests that the action herein may actually be moot. *Id.* at 91, n.6.

[5] Jurisdiction of the district court over actions brought under Section 7428 rests on 28 U.S.C. § 1346(e).

United", Inc., 416 U.S. 752 (1974), this Court pointed out that the difficulties in securing judicial review of administrative determinations gave the Commissioner of Internal Revenue inordinate power over charitable organizations. In response, the Congress enacted Section 7428 as a limited exception to Section 7421, to allow for judicial review of the Internal Revenue Service's administrative determinations as to exempt status. The scope of such review and the nature of the relief contemplated, however, are quite limited. Specifically, since the court's role is to review the correctness of the Commissioner's administrative determination, the court may not consider an issue that the Commissioner himself is precluded from considering.

In *Houston Lawyer Referral Service, Inc. v. Commissioner*, 69 T.C. 570 (1978), the Tax Court noted that an action under Section 7428 "is called a declaratory judgment, but it has much narrower scope than exists in respect of declaratory judgment litigation in the United States District Courts generally." *Id.* at 573. The court pointed out that the legislative history of the provision indicates that "the court is to base its determination upon the reasons provided by the Internal Revenue Service in its notice to the party making the request for a determination, or based upon any new argument which the Service may wish to introduce at the time of the trial." *Id.* at 573-574. Furthermore, a court may not issue a declaratory judgment under Section 7428 unless it "determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service." Section 7428(b)(2); *see* S. Rep. No. 938, 94th Cong., 2d Sess. 590 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4014. The Tax Court has stated that the requirement of exhaustion of administrative remedies is the basis for its rule that "disposition of an action for declaratory judgment, which does not involve a revocation, will ordinarily be made on the basis of the administrative record . . . ." 69 T.C. at 574; *see*

Tax Ct. R. 217(a). In *Houston Lawyer Referral Service* and a line of subsequent actions brought under Section 7428, the Tax Court has refused to consider evidence not contained in the administrative record, reiterating that "our function with respect to declaratory judgment proceedings is to review respondent's administrative determination." *Church in Boston v. Commissioner*, 71 T.C. 102, 105 (1978). The U.S. District Court for the District of Columbia has specifically adopted the Tax Court's rule limiting the scope of judicial review to the administrative record.[6]

The limited scope of review in proceedings under Section 7428 requires that not only new evidence but also new issues or arguments be excluded.

> The reason an interested party is required to exhaust his administrative remedies by presenting all of his objections to the Commissioner is to insure that the Commissioner has had an opportunity to rule on such matters before the petitioner requests this court to review the Commissioner's action. As to allegations in the petition not previously raised . . . the Commissioner has had no opportunity to pass on such matters, and therefore there is no action by him with respect to such matters for us to review.

Thompson v. Commissioner, 71 T.C. 32, 37 (1978).[7]

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[6] Southwest Virginia Professional Standards Review Organization, Inc. v. U.S., 78-2 U.S. Tax Cas. (CCH) ¶ 9747 (D.D.C. 1978); *see also*, Virginia Professional Standards Review Foundation v. Blumenthal, 466 F. Supp. 1164 (D.D.C. 1979).

[7] *Thompson v. Commissioner* involved a declaratory judgment action under Section 7476 with respect to an employee pension plan. Tax Court Rule 217, however, applies equally to declaratory judgment actions under Sections 7476 and 7428. Tax Ct. R. 210; *see* S. Rep. No. 938, 94th Cong., 2d Sess. 588 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 4012 ("Insofar as possible, [section 7428] rules should conform to the rules that the Tax Court develops with regard to declaratory judgment suits as to retirement plans, under section 7476 of the Code.").

It seems quite clear, therefore, that Section 7428 was not intended to provide jurisdiction for review of the constitutional questions here at issue. The function of a court in this limited declaratory judgment proceeding is simply to review the correctness of the Commissioner's administrative determination. Because the Commissioner is without power to declare a tax statute unconstitutional,[8] there could not have been an administrative determination of appellee's constitutional claims. Consideration of the constitutional issues by the district court was thus necessarily *de novo*, both as to the issues and as to the facts necessary to support the equal protection claim. Since the district court could not properly consider such matters *de novo*, there was no jurisdiction in that court to review appellee's constitutional claims. As to such claims, the Court should find that the original jurisdictional inadequacy cannot be waived, and that such issues cannot be reviewed in this proceeding. *See California v. Grace Brethren Church*, 50 U.S.L.W. 4703, 4709 (U.S. June 15, 1982), in which the Court declined to consider First Amendment claims in an appeal brought under 28 U.S.C. § 1252, after determining that the district court lacked jurisdiction by reason of the Tax Injunction Act, 28 U.S.C. § 1341.

II. THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO ALLOW THE COURT TO REVERSE THE COURT OF APPEALS ON PLENARY REVIEW.

The decision by the court of appeals with respect to appellee's equal protection claim rested upon its finding that "[n]o identifiable governmental interests justify the differential tax treatment of lobbying by veterans' groups and Section 501(c)(3) organizations." J.S. App. at 67a. Although the record before the Court is flawed, it pro-

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[8] In Johnson v. Robison, 415 U.S. 361, 368 (1974), the Court noted that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *See also* Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

vides sufficient evidence to contradict such finding and to allow the Court on plenary review to reverse the decision below.[9]

As appellant has indicated, "[i]n contradistinction to the situation presented by Section 501(c)(3) organizations, Congress has not identified any problem in according tax benefits to veterans' organizations because of their lobbying activities."[10] The legislative history makes clear that Congress regarded the use of deductible contributions to fund lobbying efforts by Section 501(c)(3) organizations as presenting a serious problem, in that such efforts might be directed to the furtherance of private rather than institutional interests. Congress was aware that the lobbying restriction that it was enacting would not be imposed on all tax-exempt organizations, and must therefore have intended the lobbying limitation to apply only where an abuse had been identified. 78 Cong. Rec. 5861, 5959 (1934).[11]

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[9] The VFW endorses the position set out in appellant's Jurisdictional Statement that the standard of review to be applied in determining the constitutionality of distinctions drawn between veterans' groups and Section 501(c)(3) organizations is whether such distinctions are rationally related to the achievement of a legitimate governmental purpose. J.S. at 12-23, *see also*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40-41 (1973); Madden v. Kentucky, 309 U.S. 83, 87-88 (1940).

[10] Supplemental Brief for the Appellees on Rehearing *En Banc* at 39, Taxation With Representation of Washington v. Regan.

[11] The court of appeals was troubled by the question of legislative intent because it misconstrued the legislative history of the Revenue Act of 1934. The limitation on lobbying in Section 23(o)(2) of that Act originated in the Senate. During the Senate debate, the distinction drawn in the lobbying rule between various classes of tax-exempt organizations was noted and questioned. It was agreed that the amendment would be reexamined by the conferees. 78 Cong. Rec. 5959 (1934). The majority interprets the subsequent failure of the conferees to revise the Senate language as "oversight." J.S. App. at 52a. Since the issue was raised during the Senate debate, however, the failure of the conferees to revise the amendment can be construed only as *approval* of the line drawn in the Senate. Hence, from the inception of the lobbying rules, favor-

Despite extensive review from 1969 to 1978 of the rules affecting both tax-exempt status and the charitable contribution deduction, Congress did not disturb the special tax treatment accorded veterans' groups. *See* J.S. at 17-18. Throughout this period, Congress held lengthy hearings and considered numerous bills relating to the legislative activities of tax-exempt organizations.[12] The provisions finally enacted after this extended consideration were designed to provide greater specificity and predictability in the rules relating to the lobbying activities of Section 501(c)(3) organizations. *See* Sections 501(h) and 4911, added by Sec. 1307 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1720, 1723. These new lobbying provisions, enacted after eight years of continuous legislative activity in the exempt organization area, left intact the ability of veterans' organizations to lobby with tax-deductible contributions. The implicit determination by the Congress in 1976 that lobbying limits were not to be extended to veterans' groups is particularly significant in view of its 1972 review and sub-

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able treatment of veterans' groups has been the product of deliberate Congressional action, and reflects a perceived potential for abuse by one group but not another.

[12] *See, e.g., Tax Reform, 1969: Hearings on the Subject of Tax Reform Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess., Parts 1-4 (1969); *Tax Reform Act of 1969: Hearings on H.R. 13270 Before the Senate Comm. on Finance*, 91st Cong., 1st Sess., Parts 5 and 6 (1969); *Legislative Activity by Certain Types of Exempt Organizations: Hearings Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972); *General Tax Reform: Hearings on the Subject of General Tax Reform Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess., Parts 4, 15 (1973); *Influencing Legislation By Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. (1976); S.1408, 92d Cong., 1st Sess., 117 Cong. Rec. 8518 (1971); S.3063, 92d Cong., 2d Sess., 118 Cong. Rec. 844 (1972); H.R. 13720, 92d Cong., 2d Sess. (1972); H.R. 4994, 93d Cong., 1st Sess. (1973); H.R. 5095, 93d Cong., 1st Sess. (1973); H.R. 14443, 93d Cong., 2d Sess. (1974); H.R. 8021, 94th Cong., 1st Sess. (1975); S.2832, 94th Cong., 1st Sess., 121 Cong. Rec. 42029-30 (1975); H.R. 13500, 94th Cong., 2d Sess. (1976).

stantial revision of the tax treatment of exempt veterans' organizations. *See* Sections 501(c)(19) and 512(a)(4), added by Act of Aug. 29, 1972, Pub. L. No. 92-418 § 2, 86 Stat. 656. The court below was thus in error in concluding that "the tax preferences for lobbying by veterans' organizations reflect no policy, but simple lack of attention and consistency on the part of Congress and the IRS." J.S. App. at 56a.

The special treatment accorded veterans' groups may also be justified on the basis of the "unique status of veterans' organizations in our society." *Id.* at 114a (MacKinnon, J., dissenting); *see also, Taxation with Representation v. U.S.*, 585 F.2d 1219, 1224 (4th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). Such treatment is consistent with a longstanding nationwide system of federal and state assistance to veterans that "has been sustained repeatedly against constitutional attack." J.S. at 19. The nature and role of veterans' organizations amply supports any preference they may enjoy with respect to the use of tax-deductible contributions. As the dissent pointed out

> War veterans have made unparalleled contributions to the creation and preservation of this nation. Their organizations have existed in this country from the beginning. These organizations have sought to aid disabled veterans, to assist their widows and orphans, and to provide for mutual support and assistance among those who served their country in time of war. *See generally* W. Glasson, Military Pension Legislation (1900). Some of these organizations play a vital continuing role in the administration of laws benefitting veterans, as Congress has specifically recognized and provided for. *See, e.g.*, 38 U.S.C. § 3402(a) (1976) (permitting veterans' organizations to represent veterans in presenting claims to Veterans Administration and the furnishing of office space to them). The close coordination between veterans' organizations and the government is unique. Congress has continued to acknowledge the importance of veterans' organizations by incorporating them with federal charters in order to permit them to carry out

their philanthropic purposes. *See, e.g.*, Pub. L. No. 97-83, 90 Stat. 1094 (Nov. 20, 1981) (chartering United States Submarine Veterans of World War II). Because of the important and unique public role played by veterans' groups, Congress could properly regard them as a different kind of entity deserving *tax* treatment different from that accorded the more generally described charitable organizations subject to section 501(c)(3). (footnote omitted).

J.S. App. at 115a-116a (MacKinnon, J., dissenting).

III. IF THE COURT IS NOT PREPARED TO DISMISS OR TO REVERSE, THEN THE PROCEEDING SHOULD BE RECOMMENCED *AB INITIO*.

A. Veterans' groups should participate in developing the record in this case.

If the Court determines that the record is insufficient to support outright reversal, then the only appropriate recourse is to have the proceeding recommenced with veterans' organizations as participants.

1. *The record below regarding the VFW is replete with error.*

Virtually every assertion made by the court of appeals with respect to the VFW is incorrect or misleading. Since a decision with respect to appellee's equal protection claim is necessarily based upon an understanding of the function of veterans' groups, the interests of justice require that a final decision in this case be made upon the basis of a record that is accurate from the outset.

The court of appeals asserted that "the Code provides open-ended subsidization of any position that [veterans'] groups choose to espouse. . . ." J.S. App. at 71a-72a. The supporting footnote states that "veterans' organizations have not restricted their lobbying to issues of particular importance to veterans, such as veterans' benefit programs," and refers in three instances to the VFW. *Id.* at 72a, n.49. The subject considered in the footnote is the proposed Panama Canal treaties. In fact, the VFW

was *invited* to appear before the Senate Committee on Foreign Relations in regard to the proposed treaties. *See Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 566 (1977) (statement of Col. Phelps Jones), *cited in* J.S. App. at 72a, n.49. Consequently, the VFW requested to testify at the House committee hearing on the same subject. The VFW testimony was given under the authority of a mandate unanimously adopted at its national convention. *See Proc. of the 78th Nat. Convention of the Veterans of Foreign Wars of the United States*, H.R. Doc. No. 292, 95th Cong., 2d Sess. 25, 66 (1978). Concern with matters affecting national security, such as the proposed Panama Canal treaties, is well within the VFW's Congressional mandate. The federal charter of the VFW provides that the organization is "to maintain and extend the institutions of American Freedom, and to preserve and defend the United States from all her enemies, whomsoever." 36 U.S.C. § 113 (1976). Like all entities exempt from income tax under any of the subsections of Section 501, the VFW must be able to establish that all of its activities, including its lobbying activities, are in furtherance of its exempt purposes. Consequently, lobbying activities outside that scope could jeopardize the VFW's exempt status. *See* Treas. Reg. §§ 1.501(c)(19)-1(a)(1) and (c). The Internal Revenue Code thus provides no "open-ended subsidization of any position" that the VFW chooses to espouse. The examples cited by the majority contradict, rather than support, its misconceived view of VFW activities.

The court of appeals also indicates that "[p]erhaps as a result of [the] uneven treatment" of different organizations in Section 501(c), "veterans' groups such as the American Legion and the Veterans of Foreign Wars are active before Congress on a large number of different issues." J.S. App. at 23a. In a supporting footnote, reference is made to four VFW appearances before Congressional committees. Two of the four appearances were not

authorized by the VFW; even in those instances, however, the speakers limited their comments to veterans' affairs. In the other two appearances, the VFW participants confined their remarks to matters affecting veterans' organizations. Again the court is misled and wrongly influenced by its lack of factual data and its misconception of the role of veterans' organizations.

2. *Veterans' organizations could provide further information in support of their specific tax code treatment.*

The fundamental legal issue presented by appellee's equal protection claim is whether special treatment of veterans' organizations in the Internal Revenue Code is justified. *No information regarding veterans' organizations was ever formally adduced during this proceeding.* J.S. App. at 49a. Appellee, of course, had no interest in presenting such information, and in the district court, appellant made only a perfunctory effort to do so. Memorandum in Support of Cross-Motion by Defendants for Summary Judgment at 40, *Taxation With Representation of Washington v. Blumenthal.* Were it not for extensive judicial factfinding by the court of appeals, the record would be almost devoid of explication of the basis of the special treatment of veterans' organizations. *See* J.S. App. at 115a-120a.

The court below portrays the VFW as an omnipresent lobbyist, promoting its views on the issues of the day, thereby curtailing appellee's right to equal protection of the law. *Id.* at 23a, n.11. The actual operation of the VFW differs strikingly from this specter. During the two-year period beginning on June 17, 1980, the VFW authorized 83 appearances before Congressional committees, 76 (92 percent) of which were at the invitation of the committee and *all* of which were related to veterans' affairs. In fact, not only are virtually all of the VFW's Congressional appearances in furtherance of its exempt purpose, but a substantial portion of the related expenditures

would appear not even to constitute "lobbying expenditures" under the Internal Revenue Code. *Cf.* Sections 4911(d)(2)(B) and 501(h).

Recalling that Congressional concern with the use of tax-deductible contributions to further private rather than institutional interests underlies the Section 501(c)(3) lobbying limitation, it is readily apparent why veterans' organizations are not subject to a similar limitation. The VFW has approximately 1,900,000 members. Its purposes are set forth in a federal charter and its institutional programs are adopted at a national convention, the proceedings of which are required by statute to be reported to Congress. 36 U.S.C. § 118 (1976). Legislative positions are adopted pursuant to an elaborate administrative framework, designed to sanction only those proposals of essential interest to the VFW's objectives. Almost all VFW Congressional appearances are made by invitation of the relevant committee, and relate to veterans' affairs. Thus, the court below is plainly in error when it says: "[t]here is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups." J.S. App. at 64a-65a.

These observations are consistent with the central role that veterans' organizations play in the relationship between veterans and the federal government. Indeed, that role is so deeply ingrained in the structure of the federal government that in many respects veterans' organizations such as the VFW function as quasi-governmental entities. The VFW represents veterans before the Veterans Administration, and occupies office space at the agency for that purpose. The VFW provides this service to any veteran, not just VFW members. The VFW also represents veterans before military boards, and occupies government office space for this purpose as well. Through its myriad state and local units the VFW is in constant touch with veterans throughout the nation. In view of the extensive, continuing contact between the VFW and veterans, and

the complexity and number of veterans' programs, Congress expects the VFW to advise it on all concerns relating to veterans' affairs. Thus, the VFW acts as an essential intermediary between veterans and the Congress. It is appropriate that such vital communications should be facilitated by the special treatment accorded veterans' groups in the Internal Revenue Code.

B. The issues involved in fashioning a remedy in this case were not adequately considered by the court of appeals.

The court of appeals held that the absence of a restriction upon the lobbying activities of veterans' groups comparable to that imposed upon charitable organizations violates equal protection principles. The court remanded the case to the district court to fashion a remedy, either by eliminating the lobbying restrictions of Section 501(c)(3) or by imposing lobbying restrictions upon veterans' groups. Even if one were to assume that an equal protection problem exists, however, the court of appeals' analysis of the remedy, based upon an inadequate record, does not take adequate account of the complexity of the statutory scheme.

Sections 501 and 170 apply distinct and complex rules to a large number of dissimilar organizations. Charitable organizations are exempt from tax under Section 501(c)(3) provided that the organizations do not engage to a substantial extent in lobbying. Such organizations may elect, under Section 501(h), to have their lobbying expenditure "allowance" measured by a sliding-scale percentage of total expenditures. Contributions to charitable organizations are deductible, provided that such organizations are not "disqualified for tax exemption under Section 501(c)(3) by reason of attempting to influence legislation." Section 170(c)(2).

Veterans' organizations may be exempt from tax under the specific provision of Section 501(c)(19) or under the more generally applicable provisions of Sections 501(c)(4) and 501(c)(7). Contributions to such groups are

deductible under Section 170(c)(3). None of these provisions imposes a specific restriction on lobbying. Treasury Regulations § 1.170A-1(h)(5) provides, however, that no deduction shall be allowed under Section 170 for amounts paid to any organization "a substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation." Although this regulation provision includes a reference to Section 501(c)(3) and its regulations "for purposes of determining whether an organization is attempting to influence legislation," its application is not limited to organizations whose tax exemption rests upon Section 501(c)(3).

The court of appeals found that Treasury Regulations § 1.170A-1(h)(5) by its terms would prohibit deductibility of contributions to veterans' groups that engage in substantial lobbying, but apparently accepted the statement of appellant's counsel that through some kind of administrative forebearance the rule is not actually applied. J.S. App. at 22a. If the Internal Revenue Service were to enforce its regulations in this respect, veterans' organizations would actually be subject to more stringent lobbying limits than charitable organizations, since veterans' organizations are not eligible to file an election under Section 501(h).

At the initial levels of consideration of this case, appellee included in its equal protection argument not only veterans' groups but also fraternal beneficiary societies, which are exempt from tax under Sections 501(c)(8) and 501(c)(10). Contributions by individuals to such societies are deductible under Section 170(c)(4), provided the contributions are to be used exclusively for religious, charitable, or educational purposes. There are not statutory restrictions on lobbying applicable to fraternal beneficiary societies. Treasury Regulations § 1.170A-1(h)(5) should apply to fraternal beneficiary societies to the same extent it applies to veterans' groups. If one gives no effect to this regulation, however, it appears that contributions to fraternal beneficiary societies for federal income tax and

gift tax purposes [13] are deductible to the extent that such contributions are used to support activities that are charitable or educational in nature, and that such societies can thus use deductible contributions to lobby, even to a "substantial" extent, so long as the lobbying is charitable in nature.[14]

It would appear from this very abbreviated analysis that fraternal beneficiary societies occupy a position distinct from that of both charitable and veterans' organizations. If Treasury Regulations § 1.170A-1(h)(5) were enforced, fraternal beneficiary societies and veterans' groups would not be able to receive deductible contributions if they lobbied to more than an insubstantial extent. Since such groups are not eligible to file the favorable Section 501(h) election, they would thus be disadvantaged by comparison to charitable groups. If Section 170 were applied without reference to Treasury Regulations § 1.170A-1(h)(5), both fraternal beneficiary societies and veterans' groups would be allowed to receive deductible contributions without regard to the extent of their lobbying. However, all activities of fraternal beneficiary societies funded with deductible contributions, including lobbying, would have to qualify as charitable or educational in nature, while veterans' groups could use deductible contributions to fund lobbying on both charitable issues and the more broadly defined matters of veterans' interest.

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[13] For federal estate tax purposes, bequests or legacies to a fraternal beneficiary society are deductible only if the society "would not be disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation." Section 2055(a)(3).

[14] For purposes of Sections 501 and 170, lobbying in furtherance of a charitable purpose is itself a charitable activity. When a particular statutory provision such as Section 170(c)(4) contains no explicit limit on lobbying, therefore, such a limit cannot be read into the statutory reference to charitable purposes. Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, 31 N.Y.U. Inst. on Fed. Tax 1415, 1422-1425 (1973).

The relationship among the various provisions of Sections 501 and 170 is obviously more complex than the court of appeals recognized. Even if it were determined that the distinctions drawn among the different classes of organizations raise an equal protection problem, the problem cannot be cured by either of the remedies presented for consideration by the district court. Specifically, the problem could not be cured by imposing a limit on the lobbying of veterans' groups, since such a remedy would leave veterans' groups without the relief afforded by Section 501(h) to charitable organizations, and would leave fraternal beneficiary societies either disadvantaged (if the Treasury applies its regulations) or unduly advantaged with respect to charitable organizations. If the Court finds grounds for an equal protection claim in the record before it, the case must be sent back to the district court not with the inadequate remand instructions of the court of appeals, but with a mandate to begin afresh to review and evaluate the broad statutory scheme.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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